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No. 624.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

EARLE C. MOODY et al.,
Appellants,

vs.

RICHMOND M. FLOWERS et al.,
Appellees.

On Appeal From the District Court of the United States for the Middle District of Alabama.

BRIEF FOR APPELLEES.

QUESTIONS PRESENTED.

1. Whether the United States Constitution requires judicial intervention to compel districting on a population basis of non-sovereign political subdivisions, including those within a state which are creatures of the legislature, where the legislature itself is apportioned on a population basis?

2. If the United States Constitution may require such districting on a population basis in some non-sovereign political subdivisions, does it require such districting where the challenged political entity is a county board of revenue created as an administrative agency of a properly apportioned Legislature, with minimal powers which are prescribed by the Legislature, and with a rational basis for districting other than on a population basis?

ARGUMENT.

I.

This Court Has Never Held That Courts Should Impose the "One-Man, One-Vote Rule" Below the Legislative Level, and Certain Recent Holdings of This Court and Statements by This Court Indicate Otherwise.

Prior to **Baker v. Carr**, 369 U. S. 186, this Court had refused to sanction judicial interference, on the ground of numerical imbalance, with the power of the states to create political subdivisions within various geographical areas. **Colegrove v. Green**, 328 U. S. 549; **Colegrove v. Barrett**, 330 U. S. 804.

In **Baker v. Carr**, this Court held that a court had jurisdiction to consider a claim that in districting for electing members to the state legislature certain citizens were denied equal protection of the laws in violation of the Fourteenth Amendment. No decision of this Court prior or subsequent to **Baker v. Carr** has held that judicial intervention is appropriate to compel districting of political subdivisions below the level of the state legislature.

Nothing in **Baker v. Carr** or its progeny suggests that this Court is directing the judiciary to plunge into an area into which it has never ventured, to apply "the one-man, one-vote" formula to non-sovereign, political subdivisions of a state. Such a task for the judiciary involving tens of thousands of public and quasi-public authorities cannot be assumed from any language of this Court in any decision.[1]

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[1] In 1960 in the 212 Standard Metropolitan Statistical Areas, covering only about 7% of the areas of the United States, there were an estimated 16,976 "local governments." U. S. Advisory Comm'n on Intergovernmental Relations for Use of House Comm. on Gov't Operations, 87th Cong., 1st Sess., Governmental Structure, Organization, and Planning in Metropolitan Areas 13-14 (Comm. Print 1961).

Moreover, certain language of this Court points clearly to the correctness of the decision below. This Court stated in **Reynolds v. Sims**, 377 U. S. 533, 575:

> "Political subdivisions of states—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate government instrumentalities created by the state to assist in the carrying out of state governmental functions. As stated by the Court in **Hunter v. City of Pittsburgh**, 207 U. S. 161, 178, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . **and the territory over which they shall be exercised rests in the absolute discretion of the state.**'" [Emphasis added.]

In **Reynolds v. Sims**, at 377 U. S. 547, 548, this Court correctly pointed out that Alabama counties are merely "involuntary political units of the state created by statute to aid in the administration of state government," and further stated at 377 U. S. 565:

> "But representative government is in essence self government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them."

The citizens of Houston County and the citizens of the City of Dothan are participating in representative government through the medium of their elected representatives in the State legislature. The Alabama Legislature is properly and fairly apportioned. Its elected representatives,

who run for office—countywide in Houston County—have determined the proper and reasonable districts within Houston County to best serve the administration of state government. As the opinion of the court below made clear, it is inconceivable that 61 per cent of the voters in Houston County who reside within the City of Dothan would tolerate any "invidious discrimination" against the urban majority (R. 62). If the urban voters desire a change in the districts in Houston County, they have only to exercise the suffrage to get a legislative delegation amenable to the urban will.

In at least two cases, this Court has declined to exercise jurisdiction for want of a substantial federal question where the challenge was to the districting of political units below the level of the state legislature. In **Tedesco v. Board of Supervisors**, 339 U. S. 940, the challenge was to the districting in the City of New Orleans. In **Glass v. Hancock County Comm.**, 378 U. S. 558, the challenge was to the districting within a Mississippi County.

These cases have seemingly recognized that no subordinate unit of government within a state has any authority which is not given to it by the state, and all authority given is subject to withdrawal by it.

II.

There Is a Rational Basis for the Districting in Houston County.

In **Baker v. Carr**, 369 U. S. 186, this Court distinguished its holding from **Tedesco v. Board of Supervisors**, 339 U. S. 940, by pointing out that in **Tedesco** "no substantial federal question was raised by a state court's refusal to redistrict city council seats, **especially as it was urged that there was a rational justification for the challenged districting.**" [Emphasis added.] Also in **Baker v. Carr**, at 369 U. S. 226, this Court stated that federal courts will

act where "a discrimination reflects no policy, but simply arbitrary and capricious action". [Emphasis the Court's.]

In the case of Houston County, a rational justification for the challenged districting is present. The County is divided into five districts with one commissioner from each district. The presiding officer for the Board of Revenue is the probate judge, who is elected countywide.[2]

Approximately 85 to 90 per cent of the duties of the members of the Board of Revenue of Houston County relate to the establishment, maintenance, repair and construction of roads and bridges (R. 81). Houston County has approximately 1,100 miles of public roads, exclusive of public streets in the City of Dothan (R. 87). Of course the public streets in the City of Dothan as in other Alabama municipalities are constructed and maintained by the City. Less than 5 per cent of the street or road maintenance within the City is done by the County or its Board of Revenue. (The Legislature prescribes the portion of the road tax which must be paid to the municipality. Title 12, § 130.)

By the act of the Legislature creating the Houston County Board of Revenue, each member of the Board is required to live within the district from which he is elected, and is charged with the responsibility "at all times for making proper inspections of roads and bridges, and other county property lying within his respective district" (R. 24). Each of the four rural districts in Houston County contains slightly less than 25 per cent of the public roads in Houston County (R. 87).

The intent of the Legislature is clear, i. e., to have a public official in each of the designated geographical areas within the county who, in the fulfillment of his duties in his particular district, is responsible to the voters of that

[2] The Probate Judge is a non-voting member except in case of a tie vote.

district. The framers of the legislation creating the Board of Revenue of Houston County very soundly provided that these duties should rest with persons who reside in and are familiar with the affected areas. The importance of localized supervision of rural roads and bridges is demonstrated by the interplay of state-municipal-county powers and duties. The state legislature acts for all citizens, urban and rural, with respect to state roads. The City of Dothan acts for its citizens with reference to city streets and bridges. The Board of Revenue acts for the rural resident in matters relating to the county roads and bridges.

With so substantial a part of the duties of the County Commissioners relating to roads, it is rational that districts within the County should bear a close relation to the roads to be maintained by the Board of Revenue, particularly where the Legislature charges special responsibility for the roads in each district to the Commissioner residing therein. It is rational for the Legislature to have the county roads administered by persons on the Board who are themselves using these roads, dependent on them, and whose neighbors are vitally interested in their proper maintenance.

The city voters alone control their streets, location, and maintenance. Is it "irrational" that city voters have no more commissioners on the council than each of the four other districts, where each of the other districts contain many more miles of public roads maintained by the county and hence much more work for the district commissioners in those districts than for the commissioner in the urban district?

Appellants do not state how many Commissioners they think should be from the City of Dothan. Presumably they would want on a basis of numerical balance a minimum of two or three out of five commissioners. Is it "rational" that the district with almost no roads or

streets to be administered by the County, should have a majority of the commissioners, even though the residents of this urban district are not dependent on the county roads and have little interest in them?

> "It has come to pass that the city government with its legislative, executive and judicial branches, is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of rural dwellers." **Avery v. Midland County** (Tex.), 406 S. W. 2d 422.

To require a majority of the commissioners from a district which is least concerned with county problems seems unwise and illogical.

Appellees have argued in this brief that the present system of districting in Houston County is the fairest system of districting, and the most rational system for districting because of the nature of the duties of the Board of Revenue of Houston County. The burden on appellees, however, is not to establish that the present districting system is **the** fairest or **the** most rational, but that it is not arbitrary or capricious, that it is not "irrational" and the result of "no policy".

In **McGowan v. State of Maryland**, 366 U. S. 420, 425, 426, this Court stated:

> "The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended **only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.** State legislatures are presumed to have acted within their constitutional power

despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." [Emphasis added.]

The act of the Alabama Legislature in creating the districts in Houston County "certainly is based on a state of facts reasonably . . . conceived to justify it." **McGowan v. Md.**, 366 U. S. 420, 425-426.

This Court in **Baker v. Carr** seemingly made clear that it was concerned with "invidious discrimination" and "an irrational" favoring of one group of voters over another in the election of members of a state legislature. There is no "invidious discrimination" in the districting of Houston County, and no "arbitrary" or "irrational" favoring of one group of citizens over another.

III.

"One-Man, One-Vote Rule" Is Inapplicable to Alabama Counties, Which Lack Any Substantial Governing Powers and "Are Created by Statute to Aid in the Administration of State Government."

There may be counties in other states than Alabama which have broad powers of government. No such powers are granted to county-governing bodies in Alabama. In Alabama a county is solely a creature of the sovereign will of the Legislature. It exercises only administrative functions. It has no power to make laws, and it makes none. "A county is but a governmental agency possessing no power and subject to no duty not originating from the law by which it is created, and in which its functions are defined." **Tuscaloosa County v. A. G. S. Rwy.**, 227 Ala. 428, 150 So. 328. Whatever power is delegated to it by the State is the power of the State and its nature is not changed by the delegation. **Laney v. Jefferson County**, 249 Ala. 612, 32 So. 2d 542; **Askew v. Hale County**, 54

Ala. 639. Section 44 of the Constitution of Alabama vests legislative power in the Legislature, and the constitutional power to make laws may not be delegated to a county or any other agency. **Fox v. McDonald,** 101 Ala. 51, 13 So. 416.

To emphasize the limited power of the Board of Revenue of Houston County, it has only **four** employees—an engineer, an assistant engineer, a clerk and a county attorney (R. 85, 86). Even the salaries for the Board members, $1,800 per year, and the salary of the engineer, are set by the Legislature (R. 25, 23).

Such important county officers as sheriff, tax assessor, district attorney, tax collector, and probate judge are elected officials, and are in no way responsible to the Board of Revenue. Their duties, salaries, and terms of office are set by the Legislature or the Constitution of Alabama. They are elected by all the voters in the County, and they perform vital functions which affect the affairs of all the people in the County.

It is consistent with the limited, administrative authority of the Board of Revenue, that it lacks even the power to redistrict itself (R. 19-26). This power too, abides solely in the Alabama Legislature, and the Legislature of course has prescribed the districts in Houston County which are challenged in this action. The Board of Revenue of Houston County neither created the districts, nor has the power to alter them. In certain states, the county is given the power of redistricting itself, **Griffin v. Board of Supervisors** (Cal.), 384 P. 2d 421, but not in Alabama.

The primary function served by the creation of the Houston County Board of Revenue is the administrative one of having a local agency charged with responsibility for the county roads and bridges. Not only do the county roads and bridges absorb 85 per cent to 90 per cent of the time of the Board of Revenue, the other duties of the

Board are almost entirely routine and custodial in nature (R. 103).

The Board of Revenue of Houston County levies no taxes which are not first prescribed by the Legislature, the Constitution, or by referendum (R. 102). In Alabama a county can impose only such tax, on such subject, under such circumstances, and within such rate as the Legislature authorizes. For example, the type tax available for payment of general county expenses, ad valorem tax on property, is prescribed by the Alabama Constitution, § 215, and the maximum rate is therein set. Alabama Code, 1940, Title 51, § 71, directs the Board to levy this tax, for what purposes, when, and on what property valuation. Failure of the Board to levy could be the subject of mandamus. **Slaughter v. Mobile County**, 73 Ala. 134.

In their brief, appellants argue that if local government is to be responsive, "the makeup of the governing bodies of our municipalities must be fairly representative of the people" (P. 19). It must be emphasized that the Board of Revenue of Houston County has not a fraction of the power of a municipality. A county has no general power to enact legislation such as is granted to a municipal corporation in Alabama by Title 37, § 455 of the Alabama Code, 1940, as amended.

"A county is declared to be an involuntary body corporate—an arm of the state (not like a voluntary corporation or municipality, such as a city)." **Calhoun County v. Brandon**, 237 Ala. 537, 187 So. 868.

The complaint in this case, Par. IX, describes the Houston County Board of Revenue as "the local governing body" possessing "broad governing powers". This is a gross misdescription. The county in Alabama is not in any sense a "general purpose government". In addition to the limitations on the Board of Revenue with reference to tax, other important limitations are present:

(1) Title 12, § 92, provides that a county governing body may not issue bonds without the approval of the voters of the county.

(2) Amendment 202 of the Constitution provides for a levy by a county governing body of an educational tax only upon a vote of the people of the county, without regard to the districts which are here under attack.

(3) Amendments 59 and 72 of the Constitution provide for hospital taxes only upon a vote of the people, again without regard to districts.

The Supreme Court of Texas considered the applicability of "the one-man, one-vote" principle to county governmental bodies. In holding that the principle did not apply, the Texas Court pointed out: **Avery v. Midland County** (Tex.), 406 S. W. 2d 422, 426—

> "The primary function of the commissioners court is the administration of the business affairs of the county . . . Its legislative functions are negligible and county government is not otherwise comparable to the legislature of a state or to the federal Congress where 'the one-man, one-vote' principle is asserted in its most exacting and compelling sense."

The principal functions of a county governing body in Alabama are building and maintaining such roads in the county as are not built and maintained by the state or municipalities, and providing necessary buildings and office space for county officials. The county governing body lacks even the authority to move the courthouse from one location to another. **Constitution**, Art. 2, § 41. The jurisdiction over roads and bridges referred to in Par. IX of the complaint is effectually limited by Title 12, § 130, which provides that out of the proceeds of any road tax levied by a county governing body, **one-half of the money collected on property in the municipality must be paid to the municipality for use by the municipality**

in maintaining the city streets. While services to the citizen by city and state governments have proliferated, the powers, duties and services of the county administrative board have remained basically the same since the Nineteenth Century.

The opinion of the court below properly found that the Houston County Board of Revenue is an administrative body lacking sufficient governmental power to be subject to judicial redistricting.

IV.

In the Overall Administration of State Government, the Alabama Legislature Which Is Properly Apportioned Has Power to Redistrict Counties Whenever Deemed Advisable.

This Court has pointed out that a strong motivation for formulating "the one-man, one-vote rule" at the legislative level was the total inability of state legislatures to correct long-standing abuses of legislative malapportionment. **Reynolds v. Sims**, 377 U. S. 533, 570, and see **Baker v. Carr**, 369 U. S. 186, particularly concurring opinions by Justice Clark and Justice Stewart. The absence of any adequate remedy other than judicial relief at the legislative level has been one of the grounds asserted for exercise of equitable relief. See, for example, **WMCA, Inc. v. Lomenzo**, 377 U. S. 633, 636.

In his concurring opinion in **Baker v. Carr**, Justice Clark stated:

> "Although I find the Tennessee apportionment statute offends the equal protection clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no 'practical opportunities for exerting their political weight at the polls' to correct the existing 'invidious discrimination' . . . The majority

of the voters have been caught up in a legislative strait jacket." 369 U. S. 186, 258, 259.

As has already been pointed out, no such "strait jacket" exists with reference to county governing bodies in Alabama. The majority of the voters in Houston County who live in the City of Dothan could achieve redistricting through their elected representatives to the Legislature at any election. The members of the Legislature under **Reynolds v. Sims**, 377 U. S. 533, are elected in accordance with the "one-man, one-vote" principle. The Legislature has the power to redistrict, and the voters have the power to elect legislators to carry out their wishes relative to county redistricting. A practical political remedy is available, which was not available when this Court held "the one-man, one-vote rule" applied to state legislatures. Moreover, the existence of this practical political remedy is itself strong evidence that there is no "invidious discrimination."

CONCLUSION.

No decision by this Court has indicated that this Court would require a purely mechanical application of "the one-man, one-vote" principle to non-sovereign political subdivisions of a state. Statements by this Court in **Baker v. Carr** and **Reynolds v. Sims**, and this Court's holdings in **Tedesco v. Board of Supervisors**, 339 U. S. 940; and **Glass v. Hancock County Comm.**, 378 U. S. 538, point to an opposite conclusion. If the principle is to be applied and the judiciary is going into these vast new areas, it should only do so where the challenged numerical imbalance has no rational justification. It should not be done where the challenged political unit is only a creature of the Legislature, created primarily for the task of administering the county road and bridge programs. Finally, it should not be done where the challenged imbalance was not created by the political unit, but was created by a fairly apportioned legislature which is capable of correct-

ing the numerical imbalance at any time if believed by it to be in the interest of better administration of state government.

Respectfully submitted,

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I, Truman Hobbs, one of the attorneys for the appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of March, 1967, I served copies of the foregoing Brief for

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